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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL PRYZVIESKI, Defendant and Appellant.	A092005 (Contra Costa County Super. Ct. No. 991174-4)

Defendant was charged with one count of unlawfully committing a lewd and lascivious act with the body of a child under the age of fourteen years (Pen. Code, § 288, subd. (a))[1] and one count of penetrating the genitals of a child under the age of fourteen years with a foreign object (§ 289, subd. (j)). A jury found defendant guilty of the first offense, but found him not guilty of the second, instead finding him guilty of the lesser included offenses of misdemeanor battery (§ 242) and misdemeanor assault (§ 240). The court denied probation to defendant and sentenced him to the mitigated term of three years for having committed a lascivious act. It sentenced him to six months in county jail for the misdemeanor battery, with credit for time served. It dismissed the assault conviction as a necessarily included offense to the battery.

FACTS

Defendant was married to the victim's father's sister, and had known the victim for many years. By the time of the present offenses, defendant long had been separated from his wife and was seeing another woman—a friend of the victim's mother. On the

[1] All statutory references are to the Penal Code.

night in question, defendant and his girlfriend were babysitting the 11-year-old victim and her two younger brothers. Defendant and his girlfriend took the children out for the evening, returning home late. They all then lay down on a sofa bed to watch television. Defendant lay on one side of the sofa bed, his girlfriend was next to him, and the victim was next to her. Defendant and his girlfriend were clothed, but the victim was in her pajamas. The victim's parents returned home, and, finding everyone asleep on the sofa bed, decided not to disturb them.

Defendant's girlfriend got up early the following morning to use the bathroom. When she returned she realized she could not get back onto the sofa bed without waking everyone else, so she went to a nearby bedroom and fell asleep there. The victim then was located next to defendant, with her back to him. She scooted over to him to get warm. She testified that defendant reached under her pajamas and underwear and rubbed her genitals with his fingers. She pretended to sleep and moved away, but he followed her, continuing to rub and breathing heavily. She believed that he was awake. The rubbing went on for approximately five minutes. At that point the victim said something along the lines that she was going to the bathroom. The victim testified that defendant's eyes were open, and he looked "kind of scared, but not totally." She told a police investigator that defendant had an "astonished" look on his face.

The victim got up, and went to her parent's room where she woke them. Her mother testified that the victim was agitated and nervous, and told her that defendant had touched her vagina under her pajamas. The victim complained of pain. A medical examination showed no physical trauma to the victim's genitals, but the prosecution's medical expert testified that lack of physical trauma does not of itself either prove or disprove that sexual abuse has occurred.

Defendant argued that he lacked the intent to commit the offenses either because he was unconscious when he touched the victim or because he acted out of mistake. He introduced evidence that he had suffered three serious head injuries over the course of his life, with the result that he had difficulty learning things, remembering things and

sleeping. He stated that he had trouble waking up, finding it hard to become conscious and to focus.

Defendant testified that he did not remember what happened on the morning in question. Defendant testified that he did not recall thinking that the victim was his girlfriend, or that he ever told anyone that he thought the victim was his girlfriend. He also stated, however, that he often touched his girlfriend on the vagina in the mornings, a statement that his attorney used to support the defense theory of mistake. Defendant's girlfriend contradicted this statement, testifying that she had had sexual relations with defendant only about eight times over the course of their relationship, and only once in the morning, and that defendant did not fondle her sexually in the mornings.[2]

Dr. Howard J. Friedman, a neuropsychologist, confirmed that defendant's brain had abnormalities in the left temporal region, a region intricately involved in memory formation. Defendant's ability to perceive and incorporate new information was impaired, which then impaired his ability to recall things. Dr. Friedman also testified that defendant was at the low end of the spectrum in his ability to become fully alert or attentive.

Dr. Friedman testified that defendant had told him about waking up with the victim next to him saying that she had to leave to go to the bathroom. He also testified that defendant had reported that the incident "was a blur," and explained that people with defendant's impairments might engage in "confabulation," a process whereby people will fill gaps in their memories with information received from other sources without knowing that they are doing so.

In closing argument, defendant's attorney emphasized the evidence that defendant has difficulty processing information and is slow to wake up. He argued that the evidence supported the conclusion that defendant was effectively unconscious when he

[2] Defendant introduced evidence that the girlfriend had told an investigating officer that defendant had no particular preference as to the time he liked to engage in sexual acts, but that he did like to be close to her in the mornings and might touch her sexually then. The touching sometimes would lead to intimacy, but it was not a pattern with him.

touched the victim. Counsel also reminded the jury that defendant had testified that he generally touched his girlfriend's genitalia in the mornings, and that the victim had reported that defendant had an astonished look on his face when she told him she was going to get up and go to the bathroom. Counsel argued it could be inferred from these matters that defendant, in a semi-conscious state, believed he was touching his girlfriend when he touched the victim.

The jury rejected defendant's arguments, finding him guilty of committing a lewd act on a child, and therefore finding that he touched the victim with the specific intent to arouse, appeal to or gratify the lust, passions or sexual desires of himself or of the victim. (§ 288, subd. (a).)

DISCUSSION

I.

CALJIC No. 2.28

During an evidentiary hearing relating to defendant's intention to call Dr. Friedman as an expert witness, the prosecutor asked the witness about the disparity between his report that defendant told him he recalled waking up next to the victim, and Dr. Friedman's conclusions that defendant could recall very little about that morning. Dr. Friedman, while looking through his report, pulled out a note made after a telephone conversation with defendant approximately one week after Dr. Friedman wrote his report. Dr. Friedman, referring to the note, stated that defendant was uncertain as to whether his memory reflected his independent recall of the incident or if it resulted from what he had been told by other people. The prosecutor asked Dr. Friedman about the note, reminding him that he was to have turned over all of his notes to her. Dr. Friedman explained that he did not know why the note had not been sent, explaining that he had instructed his secretary to send a copy of everything in his file. He admitted, however, that he had told the prosecutor that he destroyed all of his notes after producing a written report, and that, to his knowledge, no notes had been turned over to the prosecution.

The prosecutor mentioned the note during her cross-examination of Dr. Friedman before the jury, asserting that it changed the nature of defendant's statements and

establishing that Dr. Friedman should have turned the note over to the prosecution but failed to do so. On redirect, Dr. Friedman explained that he had forgotten about the note after shoving it into his file, and had not turned it over to either the prosecution or the defense. During closing argument, the prosecutor pointed out that the telephone conversation occurred after Dr. Friedman's report came out. She argued that defendant must have realized Dr. Friedman's report of defendant's memory of the events "absolutely obliterates" defendant's claim that he did not recall anything. She theorized that it therefore was necessary for defendant to come up with some way to counter the report, which he did by telling Dr. Friedman that he wasn't sure whether he actually remembered the events or if he was reporting something that he had been told.

The court instructed the jury in accordance with CALJIC No. 2.28:

"The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of truth, save court time, and avoid any surprise which may [a]rise during the course of the trial. Concealment of evidence and/or delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the noncomplying party's evidence.

"Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the defendant concealed or failed to timely disclose the following evidence: Note of Dr. Friedman regarding his conversation with the defendant.

"Although the defendant's concealment and/or failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial.

"The weight and significance of any concealment and/or delayed disclosure are matters for your consideration. However, you should consider whether the concealed and/or untimely disclosed evidence pertains to a fact of importance, something trivial, or a subject matter already established by other credible evidence."

Defendant, citing *Sandeffer v. Superior Court* (1993) 18 Cal.App.4th 672 (*Sandeffer*), argues that the prosecution was not entitled to Dr. Friedman's notes, and that the court therefore erred in instructing the jury that the defense acted improperly in failing to make the note of the telephone conversation available until the evidentiary hearing. The court in *Sandeffer,* in dicta, opined that an order requiring an expert witness to provide his or her " 'notes' in most circumstances would go beyond the specification of discoverable items set forth in [the Penal Code's discovery statutes]."[3] (*Id.* at p. 679.)

Defendant also cites the discussion and decision in *People v. Bell* (2004) 118 Cal.App.4th 249 (*Bell*), where the Third Division of this court criticized CALJIC No. 2.28, for suggesting that the defendant should be punished for the failure of a witness to make a timely disclosure of evidence, inviting the jury to speculate without guidance that

[3] In *Sandeffer,* defense counsel delayed providing the prosecution with discovery relevant to an expert, asserting that the defense had not decided whether to call the expert as a witness. The court, finding that there was "every probability" that the expert would be called, ordered the defense to provide the prosecution with the expert's full name and address, all reports prepared by her or on which she relied, and her notes. It was held on appeal that the trial court had exceeded its authority by requiring disclosure of these matters at a time when the witness had not been identified by defense counsel as a trial witness. The court declined to analyze the detail of the order, but stated: "We nevertheless are motivated to make brief comment for the lower court's possible guidance in terms of future orders on the subject. This order required production not only of the expert's report, if any, but also her 'notes.' The new provisions of the [criminal discovery] act are exclusive in the sense that 'no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.' (§ 1054, subd. (e).) Section 1054.3, subdivision (a) provides that discovery of information pertaining to expert witnesses shall 'includ[e] any reports or statements [of the expert] made in connection with the case, and includ[e] the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.' We are of the opinion that an order requiring the expert to produce his 'notes' in most circumstances would go beyond the specification of discoverable items set forth in the statute." (*Sandeffer, supra,* 18 Cal.App.4th at pp. 676, 678-679, fn. omitted.)

The People read *Sandeffer* as finding only that a defendant may not be required to provide the notes of an expert until that expert has been identified as a trial witness. We do not read *Sandeffer* so narrowly, but we do find the court's opinion on the admissibility of the expert's notes to be dicta. As we find any error to have been harmless, we find it unnecessary to analyze the *Sandeffer* discussion further.

the failure to disclose had an adverse effect on the prosecution, implying that the jury should "do something" about the failure to disclose without suggesting what they might do, and for failing to inform them that the violation, standing alone, was insufficient to support a guilty verdict.

The *Bell* court's concerns were echoed by the courts in *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942-943 and *People v. Cabral* (2004) 121 Cal.App.4th 748, 751-752, and we, too, have serious reservations about the propriety of CALJIC No. 2.28, particularly in a case where the defendant was in no way at fault for the witness's failure to disclose and where the notes may not have been discoverable. Ultimately, however, the question is whether the instruction is harmless, i.e., whether it is reasonably probable that defendant would have received a more favorable verdict in the absence of the court's instruction. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

One of the flaws in the instruction is its suggestion that the defendant is in some way at fault for the late discovery. Here, the jury was well aware that defendant had nothing to do with Dr. Friedman's late disclosure of the note. Indeed, the jury knew that Dr. Friedman also had not disclosed the note to defense counsel. It is inconceivable that the jury would blame defendant for his expert's lapse.

The instruction also is flawed in that it allows the jury to speculate about the effect the late discovery had on the prosecution's ability to present its case and suggests that they do something about it without providing any guidance. In *Bell,* for example, the delayed discovery related to the statements of alibi witnesses. The jury, therefore, quite reasonably might have speculated that the delay in identifying the witnesses or making the substance of their statements known to the prosecution, hurt the prosecution's ability to refute those statements. (See *Bell, supra,* 118 Cal.App.4th at pp. 253-254.) There is no such problem here. The prosecutor never suggested that her ability to make her case was compromised by the late disclosure, and made no such argument to the jury. She clearly was well acquainted with defendant's claim that he could not recall the morning's events, and thoroughly attacked that claim at trial. The jury could not reasonably speculate that the prosecution's case in any way suffered by the late disclosure of the

note. Moreover, any fear that the jury may have based its finding of guilt on the late discovery, rather than on the evidence, is negated by the fact that it found defendant not guilty of the second charged offense, penetration with a foreign object (defendant's finger).

It is true that the prosecution used the timing of defendant's telephone conversation with Dr. Friedman to attack defendant's claim that he did not remember the events of the morning in question. The instruction, however, could not have unfairly supported this argument, as the instruction referred to the timing of Dr. Friedman's disclosure of the note, not to the timing of defendant's telephone conversation. Finally, defendant's case would have suffered little harm even if the jury decided to ignore Dr. Friedman's theory of confabulation as a result of his late disclosure of the note. Whether defendant actually remembered what happened was not particularly relevant. The jury convicted him because it believed he had harbored the requisite intent at the time he fondled the victim, not because he remembered that he had fondled the victim.

We also find that the evidence of defendant's guilt was overwhelming. The victim was 11 years old at the time of the crime. Defendant's girlfriend is a mature woman. Defendant could not reasonably have believed he was fondling his girlfriend when he fondled the child. Defendant contended that he was unconscious while committing the act, but there is no evidence that defendant committed like acts while unconscious. At best, the evidence was that he liked to fondle his girlfriend in the mornings, but that evidence did nothing to suggest that he fondled her while unconscious. Although defendant, and Dr. Friedman, claimed that defendant was slow to wake up, there was evidence that defendant had been examined at the Stanford Sleep Clinic in 1992, apparently in response to his complaints of daytime sleepiness, and the clinic did not report anything about the speed with which defendant became alert upon awakening. There were no other reports by anyone, including defendant's girlfriend, that he appeared to be slow to wake up or that he did anything while semi-unconscious.

For all of these reasons we conclude that error, if any, was harmless.

II.

The "No Contact" Order

Defendant complains that upon his conviction, the trial court ordered that he not have contact with the victim or any of her family members, and that he not come within 100 yards of the victim's residence, [family's] place of business and school. Section 1202.05, which defines the scope of the court's authority in cases where, as here, a defendant is sentenced to state prison for a violation of section 288, subdivision (a), provides only that the court "shall prohibit all visitation between the defendant and the child victim." It does not authorize an order preventing contact with family members or prohibiting the defendant from being at specified locations. The People concede that the order was overbroad.

DISPOSITION

The judgment of conviction is affirmed. The visitation order is modified to provide only that defendant shall have no visitation with the child victim.

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STEIN, J.

We concur:

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MARCHIANO, P.J.

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MARGULIES, J.